Supreme Court, U.S.
FILED
NOV 23 1994
OFFICE OF THE CLERK

No. 94-765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GOODMAN HOLDINGS and ANGLO IRISH BEEF PROCESSORS INTERNATIONAL,

Petitioners,

v.

RAFIDAIN BANK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

EDWARD L. POWERS
Counsel of Record
BRIAN T. MURNANE
RICHARDS & O'NEIL, LLP
885 Third Avenue
New York, New York 10022
(212) 207-1200

Attorneys for Respondent

Dated: November 23, 1994

QUESTION PRESENTED

Does the commercial activities exception to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA"), provide a basis for subject matter jurisdiction in the United States courts over a non-U.S. plaintiff's breach of contract claims against a foreign state where (i) the parties' contractually designated place of performance is outside the United States, and (ii) prior to breach, the parties actually performed their contractual obligations outside the United States?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
PERTINENT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
The Agreements At Issue Are Unrelated To The United States	2
Proceedings in the District Court	3
Decision of the Court of Appeals	4
REASONS FOR DENYING THE PETITION	5
I. THE DECISION BELOW DOES NOT RAISE ANY IMPORTANT ISSUES CONCERNING COMMERCIAL ACTIVITY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT	6
A. Goodman Raises Primarily Factual Challenges To The Decision Below	6
B. The Decision Below Follows The Relevant Statute and Case Law	7
1. The Court Below Correctly Interpreted And Applied *Weltover*	7
2. The Theoretical Retention Of Funds In Rafidain's Accounts Was Not A "Direct Effect" Under The FSIA	9

Page

3. The Record Demonstrates That There Was No History Or Customary Practice Regarding Payment Of The Letters of Credit 12

C. Goodman Was Not Entitled To Complete Discovery On Allegations The Court Assumed To Be True, Nor Was It Entitled To A Remand To Amend Its Complaint 13

II. THERE IS NO CIRCUIT COURT SPLIT OVER THE SCOPE OF THE "DIRECT EFFECT" CLAUSE 15

A. Post-Weltover Cases 15

B. Pre-Weltover Cases 16

III. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS' DECISION CAN BE SUSTAINED ON ALTERNATE GROUNDS 18

A. The District Court Lacked In Personam Jurisdiction Over Rafidain 18

B. Forum Non Conveniens 20

C. International Comity 20

CONCLUSION 21

APPENDIX 1a

TABLE OF AUTHORITIES

Cases: **Page**

America West Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793 (9th Cir. 1989) 13, 17

Antares Aircraft, L.P. v. Federal Republic of Nigeria, 948 F.2d 90 (2d Cir. 1991), *vacated*, 112 S. Ct. 3020 (1992), *on remand*, 999 F.2d 33 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994) 11, 15, 16

Brandon v. Holt, 469 U.S. 464 (1985) 14

Chuidian v. Philippine Nat'l Bank, 976 F.2d 561 (9th Cir. 1992) 7, 9

Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238 (2d Cir. 1994) 11, 16

Conley v. Gibson, 355 U.S. 41 (1957) 14

Cornfeld v. Investors Overseas Servs., Ltd., 471 F. Supp. 1255 (S.D.N.Y.), *aff'd*, 614 F.2d 1286 (2d Cir. 1979) 20

Cunard S.S. Co. v. Salen Reefer Servs. A.B., 773 F.2d 452 (2d Cir. 1985) 20

First Chicago Int'l v. United Exchange Co., 836 F.2d 1375 (D.C. Cir. 1988) 19

Forman v. Davis, 371 U.S. 178 (1962) 14

Gilson v. Republic of Ireland, 682 F.2d 1022 (D.C. Cir. 1982) 18

Cases: **Page**

Goodman Holdings v. Rafidain Bank, 26 F.3d 1143 (D.C. Cir. 1994) ..... *passim*

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 20

Hasenfus v. Corporate Air Servs., 700 F. Supp. 58 (D.D.C. 1988) 19

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) 19

In re Axona Int'l Credit & Commerce, Ltd., 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2d Cir. 1991) 21

In re Gercke, 122 B.R. 621 (Bankr. D.D.C. 1991) 20

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 19

Layne v. Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 5

Meadows v. Dominican Republic, 817 F.2d 517 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987) 16, 17

Mizlou Television Network, Inc. v. National Broadcasting Co., 603 F. Supp. 677 (D.D.C. 1984) 20

Naartex Consulting Corp. v. Watt, 722 F.2d 779 (D.C. Cir. 1983), *cert. denied sub nom., Naartex Consulting Corp. v. Clark*, 467 U.S. 1210 (1984) 13

Petition of Brierley, 145 B.R. 151 (Bankr. S.D.N.Y. 1992) 20

Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992) ..... *passim*

Cases: **Page**

Riggs v. City of Albuquerque, 916 F.2d 582 (10th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991) 13

Saudi Arabia v. Nelson, 113 S. Ct. 1471 (1993) 5

Siderman de Blake v. Argentina, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993) . 14

Texas v. Mead, 465 U.S. 1041 (1984) 6

United States v. Johnston, 268 U.S. 220 (1925)..... 6

United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n, 33 F.3d 1232 (10th Cir. 1994) 10, 11, 15

World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 20

Statutes and Rules

28 U.S.C. § 1330(a) 9

28 U.S.C. § 1602 *et seq.* i

28 U.S.C. § 1605(a)(2) ..... *passim*

28 U.S.C. § 1608 18

Fed. R. Civ. P. 12(b)(1) 13

Fed. R. Civ. P. 15..... 14

Other

Dolan, *The Law of Letters of Credit* ¶ 4.02 at 4-6 (2d ed. 1991)..... 7

McCullough, *Letters of Credit*. § 1.05[2][a] at 1-38 (1992)..... 8

Uniform Customs and Practice for Documentary Credits, Articles 11(c), 12 (1983 Revision)..... 8

No. 94-765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GOODMAN HOLDINGS and ANGLO IRISH BEEF PROCESSORS INTERNATIONAL,

Petitioners,

v.

RAFIDAIN BANK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Rafidain Bank ("Rafidain") respectfully requests that this Court deny the petition for a writ of certiorari filed by petitioners Goodman Holdings and Anglo Irish Beef Processors International (together "Goodman"), which seeks review of the decision of the United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals").[1]

[1] In accordance with Rule 29.1 of the Rules of this Court, Rafidain represents that it is an agency or instrumentality of the Republic of Iraq and that it does not have any parent or subsidiary companies.

OPINIONS BELOW

The decision of the Court of Appeals, *Goodman Holdings v. Rafidain Bank*, is reported at 26 F.3d 1143 (D.C. Cir. 1994) and is reprinted at Goodman's Appendix ("App.") 1a-9a. The orders denying Goodman's Petition for Rehearing and Suggestion for Rehearing *In Banc* are reprinted at App. 10a, 11a. The district court's unreported decision is reprinted at App. 13a-30a.

PERTINENT STATUTORY PROVISIONS

The pertinent statutory provision, 28 U.S.C. § 1605(a)(2), is reprinted in Goodman's petition at 2. Additional relevant statutory provisions are set forth in the Appendix hereto.

STATEMENT OF THE CASE

Pursuant to Rule 15.1 of the Rules of this Court, Rafidain provides the following statement to correct numerous misstatements and distortions in Goodman's petition.

The Agreements At Issue Are Unrelated To The United States

This is an action for nonpayment of fourteen separate letters of credit issued by Rafidain, an Iraqi bank.[2] The letters of credit were issued to Goodman Holdings and its affiliate, both Irish corporations, to facilitate the sales of beef and other meats from Ireland to Iraq. Seven of the letters of credit are denominated in German deutsche marks and the others in U.S. dollars. Complaint ¶ 20, App. 36a.

---

[2] For purposes of the proceedings below, Rafidain and the lower courts accepted as true the allegations of the complaint, including Goodman's assertion that Rafidain is responsible, either directly or as alter ego, for the 14 letters of credit at issue here.

Rafidain has no branch, agency or office in the United States. The letters of credit were neither issued, negotiated nor executed in the United States.

The letters of credit require payment to be made to Goodman in Ireland. The letters do not require Rafidain to fund payments from any source within the United States, do not contain a waiver of Rafidain's sovereign immunity, and do not designate the United States as a forum for disputes between the parties.

Prior to defaulting, Rafidain made payments to Goodman in Ireland on a few of the letters of credit. However, Rafidain made no payments on the majority of the letters, and only a handful of payments on two others. Complaint, Counts II and III Tables, App. 43a-51a. Upon Rafidain's default, Goodman commenced a nonpayment action against Rafidain in the High Court in London. However, the Bank of England issued a provisional order of liquidation against Rafidain (which has a branch in London), and appointed Provisional Liquidators to oversee the liquidation proceedings. Goodman then brought the instant action for the same relief in the United States District Court for the District of Columbia.

Proceedings in the District Court

Goodman served discovery as to a number of matters, including the letters of credit, Rafidain's source of funds for payment of the letters, proceeds from petroleum sales, credit facilities, and officers and directors. Rafidain responded to Goodman's requests for admission regarding payments of the letters of credit and objected to requests that were unrelated to Goodman's claims. Goodman did not move to compel further discovery responses from Rafidain.

Rafidain moved to dismiss the complaint on the ground that the district court lacked both subject matter jurisdiction under the FSIA and personal jurisdiction under the Due Process Clause of the Fifth Amendment to the United States

Constitution. Rafidain also moved to dismiss in accordance with the doctrines of international comity and *forum non conveniens*.

In opposing the motion, Goodman effectively supplemented the factual allegations of its complaint with assertions in its briefs regarding Rafidain's general commercial activities. Notably, Goodman did not submit the letters of credit to the district court, and they are not in the record.

Following oral argument on Rafidain's motion, the district court granted the motion to dismiss for lack of subject matter jurisdiction. App. 13a. The district court assumed the truth of the factual allegations in Goodman's complaint and briefs for purposes of the motion. Applying this Court's decision in *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160 (1992) ("*Weltover*"), the district court held that Goodman's allegations and arguments did not support a finding of subject matter jurisdiction because, among other reasons, the act of nonpayment outside the United States did not have an immediate consequence or "direct effect" in the United States, under the third clause of Section 1605(a)(2) ("Clause 3").

Decision of the Court of Appeals

The Court of Appeals affirmed without dissent. The appellate court held that Rafidain's default did not have a "direct effect" in the United States because (i) the United States was not the place of performance for Rafidain's contractual obligations, and (ii) Rafidain's prior use of New York bank accounts to fund payments was inconsequential because the parties neither contractually required nor designated Rafidain's New York accounts as the source of funds for payment on the letters. 26 F.3d at 1146-47. In a concurring opinion, Judge Wald expressed her view that the United States need not be the contractually designated place of performance in order for a breach to have a direct effect here. Nonetheless, Judge Wald agreed that the facts as alleged

by Goodman do not support Clause 3 jurisdiction. 26 F.3d at 1147.

Goodman's petition for rehearing and suggestion for rehearing *in banc* were denied.

REASONS FOR DENYING THE PETITION

Under Rule 10.1 of the Rules of this Court, a petition for writ of certiorari should not be granted absent "special and important reasons." No such reasons are present here. The Court of Appeals' decision accords with the FSIA and expressly follows this Court's two recent decisions addressing the commercial activities exception: *Weltover*, *supra*, and *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993) ("Nelson"). If anything, the decision below is unremarkable and certainly does not raise any important issue that would require this Court to re-visit Clause 3 of the exception.[3]

Goodman's obligatory assertion of a circuit split is astonishing. Significantly, all but three of the decisions cited by Goodman are pre-*Weltover* cases. There is no split among the circuits, much less a "real and embarrassing" conflict of opinion warranting certiorari. *See Layne v. Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-93 (1923).

Review is also unnecessary because the court below could have dismissed the action on several alternate grounds, including lack of *in personam* jurisdiction, forum non conveniens, and international comity. See Point III, *infra*. Thus, the question presented for review by Goodman may be academic, further demonstrating the lack of any "special and important" reason for granting a writ of certiorari.

---

[3]Although Goodman argued in the courts below that this case also falls within the first clause of the commercial activities exception, the Court of Appeals -- relying on *Nelson*, -- rejected Goodman's argument. 26 F.3d at 1146. Goodman does not raise the clause one argument in its petition.

I. THE DECISION BELOW DOES NOT RAISE ANY IMPORTANT ISSUES CONCERNING COMMERCIAL ACTIVITY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

A. Goodman Raises Primarily Factual Challenges To The Decision Below

The Court of Appeals examined the record and concluded that it did not support a finding that the commercial activity exception under the FSIA applies. Accepting the truth of Goodman's factual allegations, 26 F.3d at 1144, the Court of Appeals correctly concluded that Rafidain's nonpayment had no immediate consequence in the United States.

Goodman claims that the Court "incorrectly asserted" facts regarding the source of Rafidain payments, engaged in improper factual "speculation" and failed to refer to the "actual course of events." Petition at 6, 11, 13. Goodman's arguments regarding the facts only serve to emphasize that certiorari should not be granted in this case. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *see Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens J.).

Goodman's petition repeatedly distorts the facts by implying that performance of the letters of credit took place in the United States.[4] As Goodman knows, Ireland -- not the

---

[4] *See, e.g.*, Goodman's premise for its "Reasons For Granting The Writ" (the issue is whether a foreign state loses immunity "when it breaches a contractual obligation *long performed in the United States*") (Petition at 7, emphasis added); Goodman's "Question Presented" ("Must a contract designate the United States as a place of payment . . .") (Petition at (i)); Goodman's characterization of the district court's decision below (motion granted "on the ground that the letters of credit did not *specifically designate* the United States as the place of payment . . . ." (Petition at 5, emphasis in original).

United States -- was the place of payment of the letters of credit. (At oral argument in the district court, Goodman's counsel conceded that "there was no requirement" for anything to be done within the United States.) Thus, performance on the letters of credit took place either at the place of payment (Ireland) or at the place of issuance (Iraq), but in no event in the United States. *See* Dolan, *The Law of Letters of Credit* ¶ 4.02 at 4-6 (2d ed. 1991); *see also Chuidian v. Philippine Nat'l Bank*, 976 F.2d 561, 562-63 (9th Cir. 1992).

B. The Decision Below Follows The Relevant Statute and Case Law

The Court of Appeals properly construed the FSIA's commercial activities exception and the two recent opinions of this Court addressing that exception.

1. The Court Below Correctly Interpreted And Applied Weltover

The Court of Appeals carefully examined and applied *Weltover* to this case, finding that "[t]he situation here is quite different" from *Weltover*. 26 F.3d at 1146. Goodman attacks the Court of Appeals' decision by obfuscating a critical distinction between *Weltover* and this case: in *Weltover* the United States was the place of performance for Argentina's ultimate contractual obligations. Thus, Argentina's failure to perform had an "immediate consequence" in the United States: "Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." 112 S. Ct. at 2168. Here, by contrast, the United States was *not* the place of performance under the letters of credit.[5] Rafidain's default,

---

[5] In *Weltover*, the bonds issued by Argentina expressly provided that they could be paid in New York, among other cities. 112 S. Ct. at 2164. Goodman tries to make its action appear closer to *Weltover* by stating that

(Footnote continued)

therefore, had no "immediate consequence" or "direct effect" in the United States. *Id.*

With all its stretching to fit within *Weltover*, Goodman stops just short of making the explicit statement that New York was the *place of performance* for Rafidain's contractual obligations. Instead, attempting the ploy that if an idea is repeated often enough it assumes the ring of truth, Goodman litters its petition with vague assertions that Rafidain made payments in the United States. *See, e.g.*, n. 4, *supra*. Thus, Goodman asserts that Rafidain, in paying the *first* letter of credit (L/C No. 19/31598), transferred dollars from a New York account to "another New York account selected by Goodman." Petition at 4. Goodman does not contend, however, that payment to Goodman was made in the United States by such transfer or that it was Goodman's account that received the funds.[6] At most, money was transferred *through*

---

the bonds at issue "*did not require payment*" in the United States. Petition at 11 (emphasis in original). To the contrary, the bonds explicitly designated the place of payment to include New York, at the creditors' option, and the plaintiffs did elect to receive payment there. *Id.*

Goodman further alters the facts in *Weltover* by asserting that Argentina had not performed any of its ultimate contractual obligations in New York. Petition at 11 n.8. In fact, Argentina made interest payments into plaintiffs' New York accounts in satisfaction of its contractual obligations. *Id.* at 2168.

[6] In the Court of Appeals, Goodman described the role of this New York bank as the "advising bank" on the first letter of credit. Notably, the bank that issues the letter of credit (*i.e.*, Rafidain) selects the advising bank. *See* Article 12 of the Uniform Customs and Practice for Documentary Credits (1983 Revision); McCullough, *Letters of Credit*, § 1.05[2][a] at 1-38 (1992).

Indeed, Goodman has not claimed that the New York bank it "selected" was asked to pay, accept, or negotiate the first letter of credit. Therefore, under the rules governing international letters of credit, the bank assumed no undertaking in the transaction. *Id.* at Article 11(c); McCullough, *Letters of Credit* at § 1.05[2][a] at 1-38.

this New York account to Goodman in Ireland, and only to make payment on the first letter of credit, 99% of which has been paid. Moreover, transferring money through a New York bank to effect payment in Ireland does not constitute payment in New York. *See Chuidian*, 976 F.2d at 563.[7]

Goodman also asserts that the court below noted "Rafidain's admission that 25 of the 37 payments had taken place *in* the United States." Petition at 6 (emphasis in original). This statement is patently false. Rafidain made no such admission and the court noted none. Instead, the court noted Rafidain's admission that certain payments "under the first letter [of credit... were] paid *from* United States accounts." 26 F.3d at 1147 n.3; App. 7a n.3 (emphasis added).

Try as it might to distort the record and the Court of Appeals' decision, Goodman cannot dispute that the place of performance of the letters of credit was outside the United States. Thus, the decision below does not narrow or contravene *Weltover* in any respect.

2. The Theoretical Retention Of Funds In Rafidain's Accounts Was Not A "Direct Effect" Under The FSIA

Straining to find a "direct effect" under Clause 3 of the FSIA, Goodman argues that because of Rafidain's nonpayment, "U.S. bank accounts retained large sums of money that

---

[7] Of $27,319,979.36 due under the first letter of credit, all but $233,932.97 was paid. *See* Complaint, App. 40a. Even if Rafidain's alleged payments on the first letter of credit "through" another New York bank had jurisdictional significance, this would only affect Goodman's claim for relief on that letter of credit. It is of no consequence with respect to the thirteen other contracts for which Goodman has brought suit. *See* 28 U.S.C. § 1330(a) (district court has jurisdiction over any "claim for relief" with respect to which the foreign state is not entitled to immunity). The FSIA does not allow Goodman to bootstrap a single, relatively small claim into subject matter jurisdiction for $300 million of other claims.

otherwise would have been depleted to pay Goodman." Petition at 12. Goodman's assertion does not comport with the facts or the law.

An effect is "direct" if it flows as an *immediate* consequence of the foreign state's act. *Weltover*, 112 S. Ct. at 2168. Here, the letters of credit contain no requirement as to the source of Rafidain's payments. Rafidain was free to select the sources of funds for payment and, indeed, often made payments to Goodman using funds from bank accounts outside the United States. *See* n.9, *infra*.

Moreover, there was no agreement or understanding between the parties that designated, earmarked, or escrowed funds in U.S. accounts specifically to pay Goodman. Conceivably, therefore, Rafidain could have depleted its New York accounts by withdrawing the funds in those accounts for another purpose. Thus, Rafidain's default on its obligations to Goodman did not *necessarily* result in a retention of funds in its New York accounts. Goodman's purported "direct effect" is, at best, a theoretical possibility:

> The requirement that an effect be "direct" indicates that Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States.

United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n, 33 F.3d 1232, 1238 (10th Cir. 1994).

Even assuming that Rafidain's breach resulted in the "non-depletion" of U.S. accounts, such an effect is merely incidental to the transactions at issue. "Certainly *Weltover* does not stand for the proposition that any involvement in a commercial transaction by a United States bank means that a defendant's activity has had a 'direct effect' in the United States." *Id.*

Aside from twisting the holding of a recent Second Circuit decision, Goodman fails to cite any federal court decision where the purely fortuitous retention of funds in a United States account satisfied the "direct effect" test.[8] Goodman suggests *Weltover* itself is supportive because it is a "mirror image" of this case; instead of funds failing to come into the United States, funds failed to be transferred out of the country. Petition at 10, n.7. The critical distinction -- which Goodman keeps ignoring -- is that in *Weltover* funds were *supposed* to be transferred into the United States. Thus, the default in *Weltover* had a necessary consequence in the United States.

Here, neither performance -- nor any act leading up to performance -- was *supposed* to occur in the United States. Rafidain's default had, at most, a possible incidental effect in New York, but certainly not a "direct effect" under the FSIA. *See United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1237-38 (10th Cir. 1994) (although United States bank was necessarily involved in transaction to convert proceeds of documentary credit into U.S. dollars, seller's default did not have a "direct effect" in the United States); *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 948 F.2d 90 (2d Cir. 1991) (Antares I) *vacated*, 112 S. Ct. 3020 (1992), *on remand*, 999 F.2d 33, 36 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994) (where Nigerian Airport

---

[8] Goodman erroneously contends that *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238 (2d Cir. 1994) held that "the failure to pay *from* New York accounts creates a 'direct effect in the United States.' " Petition at 10 n.7. Under the syndicate loan agreements at issue, Rafidain and its guarantor, Central Bank of Iraq, were required to make payments *in* the United States (to certain lead banks) by transferring monies into New York bank accounts. 15 F.3d at 241. The Second Circuit held that "[t]he failure of the Iraqi Banks to remit funds in New York, as they were contractually bound to do, had a direct effect in the United States under *Weltover*." *Id.*

detained U.S. plaintiff's plane in Nigeria as security for overdue airport fees and released the plane only after plaintiff made payments from New York accounts, airport's acts did not have a "direct effect" in the United States).

3. The Record Demonstrates That There Was No History Or Customary Practice Regarding Payment Of The Letters Of Credit

Judge Wald's concurring opinion suggests that a failure to make payment outside the United States "might" cause a direct effect here if there is a "longstanding consistent customary practice" to use funds from a United States account. 26 F.3d at 1147. Assuming Judge Wald's speculative view of the "direct effect" standard is consistent with *Weltover*, it is nonetheless inapplicable here because, as Judge Wald noted, Goodman made no allegation in its complaint that it was Rafidain's "longstanding and consistent practice" to use U.S. funds to make payments on the letters. *Id.*

Indeed, Goodman's complaint establishes that there was no longstanding customary practice with respect to the letters of credit. While fourteen letters of credit are at issue here (Complaint, App. 36a-37a), the tables in Goodman's complaint plainly show that there were no payments (or only minimal payments) with respect to all but three of the letters. *See* Complaint, App. 44A, 47a, 48a, 50a, and 51a. As Rafidain stated to the Court of Appeals, the letters of credit underlying 99 percent of Goodman's dollar claims and 60 percent of Goodman's deutsche mark claims have *no payment history whatsoever.*[9]

---

[9] In addition, notwithstanding Goodman's assertions to the contrary (Petition at 4, 14) the record contains Rafidain's discovery responses, in which it denied that 12 of its payments involved the use of funds from New York accounts.

C. Goodman Was Not Entitled To Complete Discovery On Allegations The Court Assumed To Be True, Nor Was It Entitled To A Remand To Amend Its Complaint.

Goodman desperately attempts to assign error to the district court for denying it further discovery and to the Court of Appeals for failing to remand so that Goodman could amend its complaint. Petition at 14, 15. Goodman's pleas ring hollow and do not constitute "special or important" reasons for granting a writ of certiorari.

As for discovery, Goodman argues that it should have been permitted to prove that United States funds were used to make all 37 payments. However, because Rafidain made a facial challenge to Goodman's jurisdictional allegations under Fed. R. Civ. P. 12(b)(1), the district court (and Court of Appeals) assumed Goodman's allegations to be true, App. 16a. Goodman was not entitled to further discovery to prove allegations the court assumed to be true. *Riggs v. City of Albuquerque*, 916 F.2d 582, 586 (10th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991).

In any event, Goodman is not being straightforward in complaining about unfinished discovery. The discovery outstanding at the time the district court ruled was unrelated to Goodman's claim that Rafidain used New York accounts to fund the payments it made on the letters of credit. Moreover, Goodman did not move to compel responses to any of its outstanding discovery, effectively foreclosing its complaint about incomplete discovery now. *See America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989). The district court did not abuse its discretion in curtailing unnecessary and burdensome discovery. *See Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 788 (D.C. Cir. 1983), *cert. denied sub nom., Naartex Consulting Corp. v. Clark*, 467 U.S. 1210 (1984).

Goodman also argues -- for the first time -- that it should have been allowed to amend its complaint to supplement its jurisdictional allegations. Goodman never asked the Court of Appeals for such relief, either in its briefs or, remarkably, in its petition for rehearing. In any event, any such amendment would have been futile because Goodman's proposed amendment (that Rafidain made its payments to Goodman using funds from U.S. accounts) would not have affected the court's decision. The cases Goodman cites in support of its argument (Petition at 14) are inapposite because they involve requests under Fed. R. Civ. P. 15 to amend pleadings to conform to the evidence (*Brandon v. Holt*, 469 U.S. 464 (1985) and *Forman v. Davis*, 371 U.S. 178 (1962)), or, in the case of *Conley v. Gibson*, 355 U.S. 41 (1957), a determination that plaintiff's complaint contained sufficient allegations to sustain its claims.

Siderman de Blake v. Argentina, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993) is also inapposite. In *Siderman*, the Ninth Circuit found jurisdiction under the first two clauses of § 1605(a)(2) and remanded the action. Because the Ninth Circuit had also found that plaintiffs might have a contract claim based on nonpayment in the United States, the court ruled that on remand plaintiffs should be permitted to amend their pleadings and pursue subject matter jurisdiction under Clause 3 as well. *Id.* at 711. Unlike *Siderman*, there is no claim or allegation here that -- if true -- would bring Goodman any closer to subject matter jurisdiction.

Indeed, *Siderman* dispels another Goodman myth -- that the courts below incorrectly imposed upon Goodman the ultimate burden of proof on the jurisdiction question. Petition at 16 n.13. It is the plaintiff who has the "initial burden of alleging jurisdiction under the FSIA." 965 F.2d at 707. Only when the plaintiff's allegations (assumed to be true) and its uncontroverted evidence bring the claims within an FSIA

exception does the burden shift to the foreign state to establish that any relevant exceptions do not apply. *Id.*

There was no improper burden-shifting here; instead, Goodman never got out of the blocks. Its jurisdictional allegations, *on their face*, are insufficient to sustain a finding of jurisdiction under Section 1605(a)(2) of the FSIA. Again, contrary to Goodman's claims, the courts below neither abused their discretion nor committed legal error.

II. THERE IS NO CIRCUIT COURT SPLIT OVER THE SCOPE OF THE "DIRECT EFFECT" CLAUSE.

A. Post-Weltover Cases

Goodman makes the farfetched argument that the Court of Appeals' decision "exacerbates a circuit split" regarding the direct effect clause which, despite *Weltover*, "continues to flourish . . . ." Petition at 17. Yet Goodman cites only three post-*Weltover* circuit court decisions that interpret Clause 3 (Petition at 17-22). None of these cases contradict either *Weltover* or each other.

In both *United World Trade* and *Antares II* (discussed at 11-12, *supra*), the courts found no direct effect under Clause 3. Thus, these decisions do not conflict with the Court of Appeals' decision. Moreover, they do not depart from this Court's teaching in *Weltover*. In *United World Trade*, the Tenth Circuit considered whether a breach of a contract that called for foreign currency payments to be exchanged to U.S. dollars caused a direct effect in the United States. (The currency exchange had previously been undertaken through a New York bank.) The Circuit Court held that because payments under the contract were due at defendant's bank in Paris, "Paris was specified as the place of performance for [plaintiff's] contractual obligation." 33 F.3d at 1237. "[T]he instant case differs in a significant respect from *Weltover*: no part of the contract in this case was to be performed in the

United States." *Id.* In other words, the failure to exchange currency in the United States was not a "direct effect" of the defendant's alleged default. *Id.* This case plainly does not conflict with *Weltover*.

Similarly, the Nigerian government's conduct in *Antares II* had no "direct effect" in the United States because the Nigerian government's acts (including its alleged tortious conduct) did not have an immediate consequence in the United States. 999 F.2d at 36. Applying *Weltover*, the court determined that plaintiff's withdrawal of funds from a New York bank account (to pay Nigerian airport fees) was not *required* and had nothing to do with defendants' alleged misconduct. *Id.* Thus, no "direct effect" in the United States was found.

The third post-*Weltover* circuit decision cited by Goodman, *Commercial Bank of Kuwait* (discussed at n.8, *supra*), is strikingly similar to *Weltover*. There, Rafidain Bank and its guarantor, Central Bank of Iraq, were required to make payments in New York. 15 F.3d at 241. Applying *Weltover*, the Second Circuit held that defendants' failure "to remit funds in New York, as they were contractually bound to do, had a direct effect in the United States under *Weltover*." *Id.* All three post-*Weltover* cases cited by *Goodman* are entirely consistent with *Weltover* and each other.

B. Pre-Weltover Cases

Goodman absurdly argues that pre-*Weltover* cases are split on the "direct effect" clause. Petition at 19-21. It is axiomatic that there cannot be a "conflict" with a decision that has lost authoritative weight by reason of a subsequent decision of this Court.

Goodman relies principally on the Ninth Circuit's decision in *Meadows v. Dominican Republic*, 817 F.2d 517 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987). However, *Meadows* is entirely consistent with *Weltover* and does not

conflict with the decision below. In *Meadows*, the Ninth Circuit found that the agreement at issue called for payment in the United States. 817 F.2d at 523. Thus, unlike Rafidain, the foreign state in *Meadows* was obligated to perform its contractual obligations in the United States. The Ninth Circuit concluded that the defendant was subject to the court's jurisdiction under Clause 3 of Section 1605(a)(2) because "the effect of the foreign state's commercial activity was in the United States . . . ." *Id.*[10]

The litany of additional pre-*Weltover* cases that *Goodman* cites as contributing to the "circuit split" do nothing to suggest a split and, like other decisions Goodman cites, are either misdescribed or vastly different from the facts here. Petition at 19, 20. Indeed, at least one of the decisions adopted the "substantiality" and "foreseeability" criteria expressly rejected in *Weltover*. *See America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 798 (9th Cir. 1989).

* * *

---

[10] In describing *Meadows*, Goodman attributes to the Ninth Circuit a statement actually made by the district court, which Goodman quotes out of context. The Ninth Circuit did *not* say that the "direct effect" test is satisfied where the defendant "could *reasonably have expected* that payment would be called for at a bank in the United States," regardless of whether the contract specifically referred to the United States, as Goodman contends. Petition at 19. In addition, the district court's complete statement demonstrates that the contract at issue plainly contemplated performance in the United States: "Thus the contract *entitled plaintiffs to specify* the place of payment; since plaintiffs reside in the United States, defendants could reasonably have expected that payment would be called for at a bank in the United States." *Meadows*, 628 F. Supp. 599, 605 (N.D. Cal. 1986) (emphasis added). The district court reached this conclusion because the contract at issue called for payment at plaintiff's bank (without identifying a specific United States bank). *Id.* at 604-05.

In all the circuit court decisions upholding jurisdiction under clause 3, the transactions at issue had far more connections to the United States than the attenuated, incidental and fortuitous connection that Goodman relies upon here, *i.e.*, Rafidain's voluntary use of funds from U.S. accounts to make payments in Ireland on letters of credit issued in Iraq. The result below would have been no different in any other circuit court.

III. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS' DECISION CAN BE SUSTAINED ON ALTERNATE GROUNDS

There are several additional grounds, not reached by the courts below, which support the dismissal of Goodman's complaint.

A. The District Court Lacked In Personam Jurisdiction Over Rafidain

Under the FSIA, if an exception to immunity is found and process is properly served, the court may exercise *in personam* jurisdiction over the foreign state. 28 U.S.C. § 1608; *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1028 (D.C. Cir. 1982). The analysis, however, does not end there. Rafidain is entitled to the same due process protections under the Fifth Amendment to the United States Constitution as any other defendant in a United States court.[11]

---

[11] As a corporation, Rafidain is a "person" entitled to assert the protection of the Due Process Clause of the Fifth Amendment. *See Gilson*, 682 F.2d at 1028-29. While this Court in *Weltover* questioned whether foreign states proper are "persons" for purposes of the Due Process Clause (citing the rule that States of the United States are not), the Court did not suggest that a state-owned corporation is not a "person" for purposes of the Due Process Clause. *Weltover*, 112 S. Ct. at 2169.

General Jurisdiction. Rafidain does not have a jurisdictional presence in the United States and thus the assertion of general *in personam* jurisdiction over it would offend Constitutional notions of due process and fairness. Rafidain has no branch, office or agency in the United States, and Rafidain is neither incorporated or registered to do business in the United States. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 411 (1984). Goodman contended below that Rafidain utilized bank accounts in the United States to carry on business elsewhere. This does not render a non-resident defendant subject to the general jurisdiction of the court. *See, e.g., First Chicago Int'l v. United Exchange Co.*, 836 F.2d 1375, 1378 (D.C. Cir. 1988) (quoting *Helicopteros*, 466 U.S. at 416) ("As the Supreme Court has stated, the mere fact that a plaintiff accepts checks drawn on a bank in particular forum 'is of negligible significance' for determining whether plaintiff has sufficient contacts with that forum").

Specific Jurisdiction. Goodman's claims of breach of contract do not arise out of or relate to any of Rafidain's alleged activities in the United States. *See International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Rather, this action arises from the sales of goods from Ireland to Iraq, the issuance of letters of credit in Iraq, and the nonpayment of the letters of credit in Ireland. The letters of credit were neither negotiated nor executed in the United States, and payment of the letters of credit did not involve the use of any agent or employee of Rafidain in the United States. *See, e.g., Hasenfus v. Corporate Air Servs.*, 700 F. Supp. 58, 63 (D.D.C. 1988) (under both the long-arm statute and the Due Process Clause, the district court lacked personal jurisdiction over defendant in breach of contract action where the contract was neither negotiated nor executed in the District of Columbia).

The exercise of personal jurisdiction over Rafidain would be unconstitutional because (i) it is not "reasonable" to require Rafidain to defend this suit in the United States and (ii) Rafidain did not purposefully avail itself of the protections

and benefits of the United States laws vis-a-vis this litigation such that Rafidain could anticipate being hauled into court here. *See World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92, 297 (1980); *Mizlou Television Network, Inc. v. National Broadcasting Co.*, 603 F. Supp. 677, 682 (D.D.C. 1984).

B. Forum Non Conveniens

This action is also subject to dismissal because the United States is a wholly inconvenient forum for the parties to adjudicate their dispute. England, where Goodman initially commenced this action, is certainly a more appropriate and convenient forum. Goodman is located there (and not in the United States). Similarly, Rafidain has a branch there (and not in the United States). *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

C. International Comity

Goodman's first action against Rafidain arising out of the nonpayment of the letters of credit was brought in the English High Court. That action was stayed by the initiation of involuntary bankruptcy proceedings against Rafidain. Goodman should not be permitted to seek a preference by pursuing a new action in the United States for the same relief. The granting of comity to a foreign bankruptcy proceeding allows the "assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." *In re Gercke*, 122 B.R. 621, 631 (Bankr. D.D.C. 1991) (*quoting Cunard S.S. Co. v. Salen Reefer Servs. A.B.*, 773 F.2d 452, 458 (2d Cir. 1985)). Under longstanding principles of international comity, this action should be dismissed in deference to the liquidation proceedings in England. *Petition of Brierley*, 145 B.R. 151, 162 n. 5 (Bankr. S.D.N.Y. 1992) (citing *Cornfeld v. Investors Overseas Services, Ltd.*, 471 F.Supp. 1255 (S.D.N.Y.) *aff'd*, 614 F.2d 1286 (2d Cir. 1979) (Canadian proceeding); *In re*

Axona Int'l Credit & Commerce, Ltd., 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2d Cir. 1991).

CONCLUSION

For the foregoing reasons, Respondent Rafidain Bank respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

EDWARD L. POWERS
Counsel of Record
BRIAN T. MURNANE
RICHARDS & O'NEIL, LLP
885 Third Avenue
New York, New York 10022
(212) 207-1200

Attorneys for Respondent
Rafidain Bank

November 23, 1994

APPENDIX

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1603. Definitions

For purposes of this chapter -

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity -

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.